IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18-08-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MRS. JUSTICE R. BANUMATHI

HABEAS CORPUS PETITION NO.186 OF 2007

Chinnathai
W/o. Solaiappa Thevar .. Petitioner

Vs.

1. The District Collector and
District Magistrate,
Thoothukudi.

2. The Secretary to Government
of Tamil Nadu,
Prohibition & Excise Department,
Fort St. George,
Chennai 600 009. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of writ of Habeas Corpus calling for the records of the first respondent in connection with H.S.(M) Confdl.No.44/06 dated 26.12.2006 and quash the same and to produce the detenu Solaiappa Thevar S/O. Ramasamy Thevar before this Court and set him at liberty now detained in Central Prison, Palayamkottai under Act 14/82.

For Petitioner : Mr.R. Rajarathinam for
Mr.V. Babu
For Respondents : Mr.M. Babu Muthu Meeran
Addl. Public Prosecutor

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O R D E R

P.K. MISRA, J

The order of detention dated 26.12.2006 under Section 3(1) of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, Slum Grabbers and Video Pirates Act, 1982 (Tamil Nadu Act 14 of

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1982) on the allegation that the detenu is a Goonda and he is required to be detained for preventing disturbance of maintenance of public order, is in question.

2. In the grounds of detention it has been indicated that detenu came to adverse notice in connection with Kovilpatti East P.S. Cr.No.484/05 dated 21.5.2005, where under the Inspector of Police had submitted information under Section 107 Cr.P.C. In Kovilpatti East P.S. Cr.No.780 of 2006 wherein the detenu along with six others were alleged to have committed offence under Sections 147, 148, 449, 302 and 506(ii) IPC. While describing the grounds on which detention has been made, it has been indicated that on 9.2.2005 one Velsamy, son of Sollaiappa Thevar was murdered by one Karuppasamy and 5 others due to motive regarding money transaction and Kovilpatti East P.S. Cr.No.85/05 has been registered under Sections 147, 148, 302 IPC., was registered and chargesheeted and was pending in the court. Because of the aforesaid case, the detenu Solaiappa Thevar and others brutally murdered Karuppasamy (Accused in the above Cr.No.85/05). For the said incident, Kovilpatti East P.S. Cr.No.780/06 was registered under Sections 147, 148, 449, 302, 506(ii) IPC against the detenu and others. On 6.12.2006 at 15.30 hrs absconding accused Solaiappa Thevar and Karuppasamy @ Chinnapandi came towards the complainant Murugan with intention to commit murder and each took out one knife and stabbed him on the chest, but such blow was evaded by Murugan. Even though one Chinna Karuppasamy and Velmurugan raised alarm, Solaiappa Thevar and Karuppasamy @ Chinnapandi escaped. On the complaint of Murugan, Kovilpatti East P.S. Cr.No.781/06 was registered under Sections 307 and 506(ii)IPC on 16.12.2006. P.T. Warrant was issued for his production on 28.12.2006. By committing the above described grave crimes in a busy locality in a business and residential area, he has created an alarm and a feeling of insecurity in the minds of the people and acted in a manner prejudicial to the maintenance of public order. The detaining authority further concluded:-

> "4. I am aware that Thiru. Solaiappa Thevar, surrendered before the court of Judicial Magistrate No.I, Sattur on 07.12.06 in Kovilopatti East P.S. Cr.No.780/06 U/s.147, 148, 449, 302, 506 (ii) IPC and remanded to judicial custody till 28.12.06. He was formally arrested in Kovilpatti East P.S. Cr.No.781/06 U/s.307, 506(ii) IPC on 16.12.06 at Central Prison, Palayamcottai. P.T. Warrant was issued to produce him on 28.12.06 in the case of Cr.No.781/06 in the court of Judicial Magistrate No.I, Kovilpatti. He is a remand prisoner kept in Central Prison, Palayamcottai. I am aware that Thiru. Solaiappa Thevar has not filed any bail application so far, and there is a real possibility of his coming out on bail by filing a bail application before the same or higher court. If he comes out on bail, he will indulge in further activities which will be prejudicial to the maintenance of public order."

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3. Subsequently the representation dated 29.1.2007 was rejected by the Minister on 20.2.2007. The rejection letter was prepared on 21.2.2007 and such rejection letter was sent to the detenu (obviously by post) on 26.2.2007.

4. In the above background, learned counsel for the petitioner has challenged the order of detention on several grounds. It is first contended by him that copy of the relied upon document with regard to Cr.No.85/2005 had not been furnished to the detenu along with the grounds of detention. Similarly, Tamil translation of pages 95 to 103 of the booklet were also not supplied along with the grounds of detention and only after representation was made, FIR in Cr.No.85/2005 and Tamil translation of pages 95 to 103 of the booklet were supplied to the detenu. Learned counsel therefore contended that the order of detention became vitiated on account of non-furnishing of documents relied upon by the detaining authority in a language known to the detenu. In support of such contention, he has placed reliance upon several decisions of the Supreme Court and this Court, which are noticed hereinafter.

5. In AIR 1980 SC 1183 (SMT. ICCHU DEVI CHORARIA v. UNION OF INDIA AND OTHERS), it was observed :-

> "3. . . . We may point out straightaway that we are not at all happy at the thought that our order may have resulted in setting free a possible smuggler. We are not unmindful of the fact that the COFEPOSA Act has been enacted for the purpose of eradicating the evil of smuggling which is eating into the vitals of the nation like a cancerous growth and eroding the economic stability of the country and when an order is made by the Court releasing a person detained under this Act, it is quite possible that the effect of the order may be to let loose on the society, a smuggler who might in all probability, resume his nefarious activities causing incalculable mischief and harm to the economy of the nation. But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the Courts to ensure that this power is exercised strictly in accordance with the requirements of the Constitution and the law. The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. The Constitution has therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. This Court has

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also through its judicial pronouncements created various legal bulworks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the Constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the Constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the Constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenu must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler from securing his release from detention, because whatever is the law laid down by the courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the Constitution and the law in regard to preventive detention without being in any manner trammeled by the fact that this is a case where a
possible smuggler is seeking his release from detention."

It was further observed:-

"6. ... Now it is obvious that when clause (5) of Article 22 and sub-section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five or fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to cl.(6) of Article 22 in order to constitute compliance with clause (5) of Article 22 and Section 3, sub-section (3) of the COFEPOSA Act. One of the primary objects of communicating the grounds of detention to the detenu is to enable the detenu, at the earliest opportunity, to make a representation against his detention and it is difficult to see how the detenu can possibly make an effective representation unless he is also furnished copies of the documents, statements and other materials relied upon in the grounds of detention. There can therefore be no

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doubt that on a proper construction of clause (5) of Article 22 read with Section 3, sub-section (3) of the COFEPOS Act, it is necessary for the valid continuance of detention that subject to clause (6) of Article 22 copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. If this requirement of clause (5) of Article 22 read with Section 3, sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void. ...

8. It may be pointed out that even if our interpretation of the words "the grounds on which the order has been made" in clause (5) of Article 22 and Section 3 sub-section (3) of the COFEPOSA Act be wrong and these words do not include the documents, statements and other materials relied upon in the grounds of detention, it is unquestionable that copies of such documents, statements and other materials must be supplied to the detenu without any unreasonable delay, because otherwise the detenu would not be able to make an effective representation and the fundamental right conferred on him to be afforded the earliest opportunity of making a representation against his detention would be denied to him. The right to be supplied copies of the documents, statements and other materials relied upon in the grounds of detention without any undue delay flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available, the latter cannot be meaningfully exercised. This would seem to be clear on a fair interpretation of clause (5) of Article 22 but apart from this view which we are inclined to take on principle as a matter of interpretation, the law is now well settled as a result of several decisions of this Court commencing from Ramachanda A. Kamath v. Union of India (1980)2 SCC 270 : (AIR 1980 SC 765) that: "When the grounds of detention are served on the detenu, he is entitled to ask for copies of statements and documents referred to in the grounds of detention to enable him to make an effective representation. When the detenu makes a request for such documents, they should be supplied to him expeditiously ... when copies of such documents are asked for by the detenu, the detaining authority should be in a position to supply them with reasonable expedition. What is reasonable expedition will depend on the facts of each case."

(Emphasis added)

6. In 1990 SCC (Cri) 258 (M. AHAMEDKUTTY v. UNION OF INDIA AND ANOTHER), it was observed :-

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"19. The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in Mangalbhai Motiram Patel v. State of Maharashtra has 'forged' certain procedural safeguards for citizens under preventive detention. The constitutional imperatives in Article 22(5) are twofold: (1) The detaining authority must, as soon as may be, i.e. as soon as practicable, after the detention communicate to the detenu the grounds on which the order of detention has been made, and (2) the detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: Ramachandra A. Kamat v. Union of India, Frances Coralie Mullin v. W.C. Khambra, Ichhu Devi Choraria v. Union of India, Pritam Nath Hoon v. Union of India, Tushar Thakker v. Union of India, Lallubhai Jogibhai Patel v. Union of India, Kirit Kumar Chaman Lal Kundaliya v. Union of India and Ana Carolina D'Souza v. Union of India.

20. It is immaterial whether the detenu already knew about their contents or not. In Mehrunissa v. State of Maharashtra it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents. In Mohd. Zakir v. Delhi Administration it was reiterated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passu the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of constitutional safeguards enshrined in Article 22(5)."

7. In 1988 SCC (Cri) 107(I) (NANDAGOPAL SAHA v. UNION OF INDIA), it was observed :-

"We are afraid we have to allow the petition on the sole ground that copies of vital documents were not furnished to the detenu and thereby he was denied a fair opportunity of making a representation. We consider that the statement of Mrs. Jhunu Rani Saha, the statement of the petitioner dated February 19, 1986 and the documents which accompanied handwriting expert's

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opinion were vital to enable the detenu to make a proper representation. In that view of the matter, the petitioner is directed to be set at liberty forthwith. The writ petition is allowed accordingly."

8. In 1988 SCC (Crl) 107 (II) [STATE OF U.P. v. KAMAL KISHORE SAINI], it was observed :-

"15. The impugned order of detention was clamped on November 28, 1985 and the period of one year as provided in Section 13 of the National Security Act has also expired. Moreover, we have already upheld the finding of the High Court that the order of detention is illegal and bad for non-supply of vital documents to the detenus to enable them to make an effective representation against the grounds of detention and as such their right to make an effective representation as contemplated under Article 22(5) of the Constitution of India has been infringed rendering the impugned order as illegal and bad. Furthermore, the non-production of relevant materials i.e. the statement of the undertrial prisoners in their application in the court that the detenus had been falsely implicated in the Crime Case No.450 of 1985 under Section 307/34 IPC as mentioned in ground No.3 and also the statement to that effect in the bail petition and the police report thereon, before the detaining authority for his consideration before passing the order of detention, renders the order of detention invalid and illegal."

9. In (1988) 1 SCC 541 (ASHOK KUMAR v. UNION OF INDIA AND OTHERS), it was observed :-

"13. It is pertinent to refer here to the decision of this Court in Smt. Icchu Devi Choraria v. Union of India wherein it has been held that the right to be supplied the copies of the documents, statements and other materials relied upon in the grounds of detention without any undue delay flows directly as a necessary corollary from the rights conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available, the latter cannot be meaningfully exercised. It has been further held that it is necessary for the valid continuance of detention that subject to Article 22(6) copies of the documents, statements and other materials relied upon in the grounds of detention should be furnished to the detenu along with the grounds of detention or in any event not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days from the date of detention. There are no exceptions or qualifications provided to this rule and if this requirement of Article 22(5) read with Section 3(3) of COFEPOSA Act is not satisfied, the continued detention of the detenu would be illegal and void. Similar observations have been made in the case of Kamla Kanahiyalal Khushalani v. State of Maharashtra(1981) 1 SCC 748."

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10. In 1999 SCC (Cri) 1160 (SOPHIA GULAM MOHD. BHAM v. STATE OF MAHARASHTRA AND OTHERS), similar views were expressed.

11. In view of these Supreme Court decisions, we are not specifically referring to several Division Bench decisions of this Court. However, reference can be made to the decisions reported in 2005 M.L.J. (Crl.)1199 (R. CHITTY RAJA v. STATE OF TAMIL NADU AND OTHERS), H.C.P.No.1473 of 2004 dated 3.2.2005 and 2006-1-L.W.(Crl.) 152 (BEPARI SALEEM v. STATE OF TAMIL NADU AND 2 OTHERS),wherein similr views have been expressed.

12. With the above background, it is to be considered whether the ratio of these decisions can be made applicable to the facts of the present case.

In the grounds of detention the detaining authority has relied upon the fact that Velsamy, son of Solaiappa Thevar - one of the culprits in the Cr.No.85/05, and as a revenge, the culprits in the present case, had committed offence under Sections 147, 48, 449, 302 and 506(ii) IPC. In other words, the offence committed in Kovilpatti East P.S. Cr.No.85/05 was the motive for the present ground case. It is therefore obvious that Kovilpatti P.S. Cr.No.85/05, particularly the FIR therein, was a most important material as well as a material document which can be considered as relied document. However, copy of such FIR was not furnished along with grounds of detention and such copy was furnished only at the time of rejection of the representation. As observed by the Supreme Court in various decisions, the intention of supply of materials, whether relied upon or referred to documents, is to enable the detenu to make effective representation and, therefore, there is no point in supplying such material documents while rejecting the representation. The contention of the Addl. Public Prosecutor that such copy of the F.I.R in Cr.No.85/2005 was not specifically relied upon or not even referred to, cannot be accepted. In the grounds of detention, the commission of the crime in Cr.No.85/2005 form motive for the crime committed as a revenge by the present culprits and such contention that FIR was not relied upon document, cannot be accepted.

13. Next contention of the petitioner is to the effect that the documents at Page Nos.95 to 103 were in English and non-furnishing of Tamil translation of such relied upon and important documents has the effect of vitiating the order of detention. In the counter affidavit filed by the respondents, the assertion that detenu knew only Tamil has not been denied. However, it is stated that such translated copies were furnished while rejecting the representation.

14. We are afraid, this stand of the respondents cannot be countenanced. On going through the grounds of detention and the documents, we find that those documents were important material documents and can be said to have been relied upon and, therefore, there was a duty to furnish translated copies of such documents. This position is very

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much clear from the decision of the Supreme Court reported in 1999 SCC (Crl) 231 (POWANAMMAL v. STATE OF TAMIL NADU & OTHERS).

15. Learned counsel for the petitioner has also submitted that the detaining authority has mechanically recited that there was imminent possibility of the detenu coming out on bail, but such conclusion is not based on any material, far less any cogent material.

16. In the present case, the detenu surrendered before the Judicial Magistrate No.1, Sattur on 7.12.2006 and the detention order was passed on 26.12.2006, hardly 19 days after. Investigation was still going on. The possibility of obtaining statutory bail under Section 167(2) proviso of the Code of Criminal Procedure ws not round the corner. Keeping in view the fact that in Cr.No.780/2006 an offence under Section 302 IPC had been committed, it cannot be assumed that such offence was of a routine nature wherein bail would be granted almost as a matter of course even while investigation was pending. In the absence of any such possibility and in the absence of any material whatsoever, conclusion of the detaining authority regarding possibility of the detenu being released on bail can only be described as mere ipse dixit and not based on any cogent materials on record. The decision of the Supreme Court in (2006)1 M.L.J.(Crl.) 539 (T.V. SARAVANAN alias S.A.R. PRASANNA VENKATACHARIAR CHATURVEDI v. STATE, THROUGH SECRETARY AND ANOTHER) appears to be squarely applicable to the present case. Incidentally such decision of the Supreme Court as well as other decisions of the Supreme Court have been analysed and followed by this Court in its judgment dated 19.6.2007 in H.C.P.Nos.56, 42, 74, 79 & 131 of 2007. Ratio of the aforesaid Supreme Court decision as well as the Division Bench decision being squarely applicable, this contention is also worthy of acceptance.

17. Learned counsel for the petitioner further contended that one of the adverse cases referred to in the grounds of detention for coming to the conclusion that detenu was a Goonda was in fact a notice under Section 107 Cr.P.C. As per the definition of Section 2(1)(f) of Act 14/1982, Goonda is a person who habitually commits or attempts to commit or abet a commission of offence punishable under Chapter XVI, XVII or XXII of Indian Penal Code. In such background, the contention of the petitioner is to the effect that reference to a case pending under Section 107 Cr.P.C. only indicate non-application of mind.

18. Adverse cases were referred to by the detaining authority only for the purpose of finding out whether a person is Goonda. Even one of the adverse cases was a proceeding under Section 107 Cr.P.C and therefore not available to be considered, since there were other cases which indicate that detenu had committed offences coming within the Chapter XVI, XVII or XXII, we are not able to accept such contention raised by the petitioner.

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19. Next contention of the petitioner is that there has been delay in consideration of the representation and subsequent communication of rejection of the representation. It is stated by the counsel for the petitioner that even though remarks were called for from the sponsoring authority on 8.2.2007, remarks were received on 13.2.2007 and, therefore, there has been unexplained delay during the aforesaid period. We do not think the period taken, obviously through post, for calling and receiving such remarks can be said to be unreasonable. Similarly, the rejection letter was prepared on 21.2.2007, but since there were three intervening holidays, on the peculiar facts of this case, we are not inclined to accept such contention.

20. Learned counsel for the petitioner has also contended that there has been non-application of mind on the part of the detaining authority as the averments made in paragraph 4 of the grounds of detention are contradictory to the documents available at Page Nos.103, 127 and 135 of the booklet

Since we have quashed the order of detention on other available grounds, we do not feel it necessary to delve into this aspect.

21. For the aforesaid reasons, the Habeas Corpus Petition is allowed and the order of detention is set aside and the detenu is set at liberty forthwith unless his presence is required in any other case.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Dpk

To

1. The District Collector and
   District Magistrate,
   Thoothukudi.

2. The Secretary to Government
   of Tamil Nadu,
   Prohibition & Excise Department,
   Fort St. George,
   Chennai 600 009.

3. The Superintendent of Central Prison,
   Palayamkottai.

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4. The Joint Secretary to Government,
   Public (Law and Order)
   Fort St.George, Chennai - 9.

5. The Public Prosecutor,
   High Court, Madras.

HCP.NO.186/2007

JSK(CO)
RVL 28.08.2007

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